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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-352

JOSEPH COLOMBO,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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POINT I

The appellant was adjudged to be in contempt of court on December 15, 1965 for his refusal to obey a lawful order and mandate of Justice Barshay in refusing to return to the Grand Jury and testify before that body after being afforded full and complete immunity.

The appellant was subpoenaed to testify before the Kings County Grand Jury on October 14, 1965. The appellant after being duly sworn, refused to answer any of the questions propounded to him based upon his respective federal and state privilege against self-incrimination. Thereafter, at

the request of the District Attorney of Kings County, the Grand Jury voted to grant the appellant full and complete immunity pursuant to former Penal Law Section 2447. Despite the grant of full and complete immunity, the appellant persisted in asserting his privilege against self-incrimination and continued to challenge the propriety, relevancy and materiality of the Grand Jury investigation.

On October 20, 1965, the District Attorney applied to the Justice presiding in Criminal Term, Part I of the Supreme Court of the State of New York, for a direction to the appellant to return to the Grand Jury and answer the questions propounded. The Court then conducted a hearing in open court, heard arguments by counsel and received briefs from the respective parties. Justice Hyman Barshay adjourned the proceeding until December 8, 1965, wherein he stated he would rule on any objections made by the appellant. On that date, Justice Barshay found that the Grand Jury investigation was proper, and directed the witness to return to the Grand Jury to testify. After hearing said direction of the presiding Justice, the appellant informed the Court that his position was unchanged and that he would refuse to return to the Grand Jury and answer any questions. The appellant was then adjudged to be in contempt of Court, pursuant to Section 750, subdivision 3 of the Judiciary Law of the State of New York, and the appellant was sentenced to a term of 30 days in the Civil Prison in the City of New York, and a fine of $250.00.

Proceedings were then adjourned to December 15, 1965, to afford the appellant an opportunity to reconsider his refusal to obey the Court's mandate. On December 15, 1965,

the position of the appellant was unchanged, and the presiding Justice signed the commitment order.

Thus, the contempt which was committed on December 15, 1965, was a civil contempt of Court, wherein the appellant refused to obey the lawful mandate of Justice Barshay who directed the appellant to return to the Grand Jury to answer legal and proper interrogatories. Justice Barshay never posed any questions to the appellant pertaining to the Grand Jury investigation. Justice Barshay only determined that the proceeding in the Grand Jury was a proper one and that the appellant should answer questions posed to him by the Grand Jury. It was the appellant's refusal to obey the lawful mandate to return to the Grand Jury which was the basis of the contempt of December 15, 1965.

The inherent power of the Courts to punish summarily for contempt have been unquestioned since the English Common Law. This power stems from the duty of the courts to preserve order, to prevent the interruption of their proceedings, to maintain the respect and authority due the court and to prevent disorderly contemptuous or insolent behavior. See: Matter of *Douglas* v. *Adel,* 269 N.Y. 144 (1953).

The purpose of permitting summary punishment for contempt, as opposed to the usual process of charge and trial, was stated by the United States Supreme Court in *In re Debs,* 158 U.S. 564 (1895), at pp. 594-595;

> "The power of a court to make an order carries with it the equal power to punish for a disobedience

> of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. And this is no technical rule. In order that a court may compel obedience to its orders it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency."

It may be conceded that this summary method of dealing with direct contempt is an anomaly in our law, which guarantees due process of law. However, it grows out of necessity, and is deemed essential in order to enable the courts to preserve their existence and power and to confer upon society the benefits which they are entitled to obtain. In the case at-bar, the Grand Jury was engaged in an investigation into the use of legitimate business enterprises as a cover for various criminal activities. The appellant's testimony was necessary in this inquiry. The immediate concern of the District Attorney was not to punish the witness for contempt, but rather for him to testify before the Grand Jury. It was for this reason that the witness was given full and complete immunity. It was also for this reason that the witness was brought before Justice Barshay, and directed to answer questions. It was believed that a direction and order from Justice Barshay would unseal the lips of the witness, but even after Justice Barshay ordered the witness to return to the Grand Jury, this mandate was refused. Therefore, the witness was properly adjudged to be in contempt of court on December 15, 1965.

POINT II

The petitioner was indicted under the Penal Law for his refusal to testify before the Grand Jury on October 14, 1965. This criminal contempt constitutes a separate wrong, distinct from the civil contempt committed in the presence of the Court on December 15, 1965. The double jeopardy clauses of the State and Federal Constitutions do not bar prosecution for one, by reason of the previous punishment of the other.

The indictment for criminal contempt was based upon the appellant's original refusal to answer questions in the Grand Jury on October 14, 1965. On this date, as indicated in Point I of this brief, the appellant refused to answer any questions, after being granted immunity and asked for a hearing to determine the relevancy of the proceedings. This request was granted by the Assistant District Attorney, and on October 20, 1965, a hearing was held in Criminal Term, Part I of the Supreme Court, before Justice Hyman Barshay. On December 8, 1965, Justice Barshay formally ruled that the contention of the appellant was ill founded, and therefore, he was directed to return to the Grand Jury to testify.

The necessary elements to find an indictment for criminal contempt was satisfied on December 8, 1965, when Justice Barshay ruled that the Grand Jury proceeding was proper, and the appellant was afforded full and complete immunity, and, was mandated to return to the Grand Jury to testify. The appellant, at this time, stipulated through counsel, that he would waive the formal requirement of returning to the Grand Jury and having the foreman of the Grand Jury direct him to answer questions. This requirement according to the laws of State of New York is necessary to

establish the element of the witness's contumacious and unlawful refusal to answer questions. (*People* v. *Riela*, 7 N Y 2d 571 (1960).) The other elements necessary to complete the crime of criminal contempt were already satisfied on October 14, 1965. In order to prove the crime of criminal contempt, the following elements must be shown;

1. That the defendant did unlawfully and contumaciously refuse to answer a legal and proper question before the Grand Jury.

2. That the quorum of the Grand Jury was present at all times, on any such day when the defendant testified and when the indictment was voted.

3. That the question which is claimed that the defendant refused to answer was a legal and proper one.

4. That any such question asked of the defendant, and which, it is charged he refused to answer, was relevant and germane to the investigation being conducted by the Grand Jury.

5. That the defendant was duly sworn as a witness and contumaciously and unlawfully refused to answer any such legal and proper question. (*People* v. *Saperstein*, 2 N Y 2d 210 (1957).)

Thus it was indeed proper for the Grand Jury to find an indictment of criminal contempt for the appellant's refusal to answer questions on October 14, 1965.

This indictment for criminal contempt is separate and distinct from the civil contempt committed before the Court on December 8, 1965. The refusal of the witness to obey the lawful mandate of the Presiding Justice in the Criminal Term, Part I, of the Supreme Court constituted a separate and distinct wrong, punishable by civil contempt and a fine.

The appellant availed himself of the Court's presence on October 20, 1965, and again repeated his refusal to testify. Appellant maintained that by this second and distinct refusal, he has successfully nullified the sanctions of the Penal Law and in effect has foreclosed any punishment under the Penal Law. Obviously, if appellant's contentions are upheld, it would be within the power of a witness to obstruct justice by the simple process of refusing to testify in a Grand Jury and then repeating this refusal before a Judge.

The New York State Legislature has made it very clear that in an appropriate situation, an individual may be prosecuted for contempt both under the Judiciary Law and under the Penal Law. Section 602 of the former Penal Law of the State of New York provides:

> "Punishment for contempt as described in Article 19 of the Judiciary Law does not bar an indictment for the same offense; but where a person who has been so punished is convicted on such an indictment, the court in sentencing him must take into consideration the previous punishment."

Does this legislative mandate of the State of New York violate the Fifth Amendment of the United States Constitution? The courts of our State have repeatedly answered this question in the negative. Typical of the views of the New York Court is the opinion *In the Matter of Amato*, 204 Misc. 454 (1923), where the court said at page 458:

> "In the first place, a civil proceeding to punish for criminal contempt and a criminal prosecution for the misdemeanor of criminal contempt are wholly independent of each other. The law contemplates that both remedies or either may be pursued."

Again at page 456:

> "In this connection, it is to be noted that the doctrine of former jeopardy does not apply to civil proceedings to punish a witness for criminal contempt, . . . for the object and purpose of such proceedings is not only to vindicate and preserve the power, integrity and dignity of the courts, but also to compel the performance of some order or decree of the court which it is within the power of the witness to perform, or to perform a public duty which the witness is bound to perform. . . ."

This case follows a long line of earlier cases involving the double jeopardy aspects of the contempt situation. It was recognized quite early that the contempts are distinct and separate and no constitutional violation is involved where the defendant is tried and punished pursuant to both criminal contempt statutes. (See: *Matter of Douglas* v. *Adel*, 269 N.Y. 144 (1935); *In Re Debs*, 158 U.S. 564 (1894); *Jurney* v. *MacCracken*, 294 U.S. 125 (1934); *People ex rel. Sherwin* v. *Mead*, 92 N.Y. 415 (1883).)

After careful examination of the events in this proceeding, it is apparent that appellant committed two separate and distinct acts, each a separate and distinct wrong, each violative of, and punishable under a separate and distinct statute. Moreover, as noted in Justice Jasen's opinion in *People* v. *Colombo*, 29 N Y 2d 1 at page 4, "that the punishment under the Penal Law and the citation for contempt of court (under the Judiciary Law) are designed to serve different purposes. The former protects the interest of the State to obtain evidence which will benefit the community as a whole, while the latter serves to protect the integrity and vindicate the power of our courts."

Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization. The rationale being simply that an individual should not be uncertain of punishment which will be inflicted upon him for a wrong that he may have committed. He should only be punished once for that wrong. Such uncertainty does not exist in the case at bar. The appellant in the case at bar, was informed in both separate proceedings that punishment will be imposed upon him if he persisted in his refusal to testify. The legislative mandate of the Penal Law was explained to him in the Grand Jury, and he was informed that his refusal to testify would be a violation of the Penal law. He was thereafter informed of the consequences of his refusal to comply with the legal mandate of the Supreme Court Justice, who was presiding in Part I of the Criminal Term of the Supreme Court. The choice was for the appellant to make; he knew the alternatives and the consequences of his choice.

Does this policy offend the people of a free society? Should not a government be able to punish an individual for his obstructiveness? Surely the testimony of the people who have knowledge of important facts is essential if many of the processes of government are to function at all. The right of every government to ask its citizens for truthful testimony should not and does not violate the Fifth Amendment of our Constitution and our concept of fairness.

POINT III

The appellant's offer to testify before the Grand Jury on May 9, 1966 was rejected by the District Attorney. This rejection does not bar a filing of an indictment for criminal contempt on October 10, 1966.

It is quite clear that a refusal to obey a court order to testify in a Grand Jury proceeding may form the basis of a civil contempt, *Shillitanti* v. *U. S.*, 384 U.S. 364, 16 L. ed. 2d 622, 86 S. Ct. 1531 (1966). In the *Shillitanti* case, the facts are remarkably similar to the case at bar. In that case Shillitanti was called before the Grand Jury investigating possible violations of the Federal Narcotic's Laws. At the Government's request, the District Judge then granted him immunity and ordered him to answer the question. When called before the Grand Jury again, Shillitanti persisted in his refusal to answer questions and the District Court Judge found him guilty of Criminal Contempt. The defendant in that case was given a two year prison sentence for his contumacious conduct. The Court found that this was a civil contempt, and therefore, it was unnecessary to have an actual trial in the matter, and it was permissible for the District Judge to impose such a sentence. In finding that this was a civil contempt, the Court reasoned that one must look at the purpose of the proceedings, to determine if it is a civil or criminal contempt. There, as in the case at bar, the People were not looking to punish the witness, but were interested in obtaining evidence for the Grand Jury. It was for the same reason in the instant case, that the District Attorney on October 20, 1965, offered to drop the proceedings against the appellant, if he returned to the

Grand Jury and testified. This offer remained open until December 15, 1965, when Justice Barshay finally signed the commitment order. It should be noted that appellant was afforded every procedural safeguard required in this contempt proceeding. Chief Judge Stanley Fuld in reviewing the aforementioned proceedings declared in the matter of *Koota* v. *Columbo*, 17 N Y 2d 147:

> "The appellants complain that they were subjected to 'summary' treatment at trial, depriving them of due process by denying them an adequate opportunity to contest the propriety of the questions. However, whether or not the court could have acted summarily (see People v. Hackley, 24 N.Y. 74, 79-80)—the record establishes that the proceedings below were neither 'summary' nor lacking in 'due process'. (See People ex rel. Cirillo v. Warden, 11 N Y 2d 51, 53.)
>
> Section 751 of the Judiciary Law provides that, in other than summary proceedings, 'the party charged (with contempt) must be notified of the accusation, and have a reasonable time to make a defense.' Here, the appellants were afforded ample notice of the proceedings; they were represented by counsel, apprised of the relationship between their testimony and the purposes of the grand jury inquiry and given every opportunity to explain their contumacious behavior. Moreover, each lawyer was supplied with the grand jury minutes covering the appearance of his client and given permission to submit a brief after the proceedings were adjourned. Six weeks later, when the trial judge had given full and thorough consideration to the appellants' contentions, they were afforded additional opportunities to justify their silence or to purge themselves of contempt. At no time did they offer any evidence to support the charge that the district attorney was acting in bad faith. Manifestly,

> the appellants were accorded every procedural safeguard to which they were constitutionally entitled. (See Matter of Ushkowitz, 15 N Y 2d 713; People ex rel. Cirillo v. Warden, 11 N Y 2d 51, supra; see, also, Murphy v. Waterfront Commissioner, 378 U.S. 52.)"

On May 9, 1966, the appellant offered to testify before the Grand Jury, and this offer was rejected. It is impossible to speculate the reasons for the refusal of the District Attorney to accept this offer. The record is barren of such information, but it is indeed obvious that the appellant's appearance before the Grand Jury on May 9, 1966 was no longer necessary, and therefore, the offer was refused. The need obviously was quite necessary on October 14, 1965, December 8th and December 15, 1965; and on these dates appellant thwarted the Grand Jury inquiry. The position of the appellant on the aforesaid dates was aimed at the obstruction of the legitimate Grand Jury inquiry.

It is indeed true that in a civil contempt proceeding, the contemnor should be allowed to purge himself, but the time made available for the contemnor to purge himself must be reasonable under the circumstances. In the instant case, the appellant offered to testify almost five months after he was found to be in contempt of court. Also, the coercive effect of a civil contempt must be examined when the testimony is necessary, not when the testimony may become futile to the Grand Jury. In fact, the date on which punishment is actually meted out is the more realistic date for assessing whether it is coercive or not, and once the need for the testimony is over, the sentence could hardly be coercive at that time.

Thus it becomes readily apparent that the appellant did in fact have an opportunity to purge himself of his contempt from October 20, 1965 until December 15, 1965. On May 9, 1966, such testimony was no longer necessary and therefore, Justice Barshay had no other alternative but to adhere to his original order of December 15, 1965.

CONCLUSION

The petition for the Writ of Certiorari should be denied.

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